

DISSENTING OPINION BY NAKAMURA, C.J.

I respectfully dissent. In my view, Plaintiff-Appellee State of Hawai'i (State) did not present sufficient evidence to prove that Defendant-Appellant Chit Wai Yu (Yu) "inexcusably failed to comply" with the condition of probation that he pay \$300 per month in restitution. See Hawaii Revised Statutes (HRS) § 706-625(3) (2014). To prove that a defendant's failure to comply with a condition of probation was "inexcusable" within the meaning of HRS § 706-625(3), the State must establish a "willful and deliberate attempt" by the defendant "to circumvent the order of the court." State v. Villiarimo, 132 Hawai'i 209, 222, 320 P.3d 874, 887 (2014) (internal quotation marks and citation omitted).

At the July 2013 probation revocation hearing, Yu presented evidence that he was homeless and unemployed and that he was receiving food stamps because he could not get a job and had no money. Yu explained that he had difficulty obtaining a job because he spoke Chinese and could not speak English, and that employers in the Chinese community were reluctant to hire him because they were aware of his conviction. Yu also testified that he had been homeless since he first met with his probation officer in June 2011 and that while on probation, he had only been employed for two months in December 2011 and January 2012 by an employer who went out of business and did not pay him.^{1/} Yu submitted to his probation officer lists of places at which and dates on which he had applied for employment, which included about twelve employers from whom he had sought employment on numerous occasions. Yu's probation officer could not confirm or deny Yu's reported attempts to secure employment.

In my view, the State failed to present sufficient evidence to show that Yu's failure to pay restitution of \$300 per month was due to a "willful and deliberate attempt" on his part to circumvent the restitution condition of probation, rather than

^{1/} The record also indicates that Yu was briefly employed between June 17, 2011 and July 2011, and that Yu worked in November 2011 for the employer that Yu said went out of business and did not pay him.

simply being caused by his lack of financial ability to pay. While the Circuit Court apparently concluded that Yu failed to make sufficient bona fide efforts to seek and secure employment that would enable him to pay restitution, I do not believe the State presented sufficient evidence to support this conclusion. Accordingly, I would vacate the Circuit Court's order revoking Yu's probation and resentencing him to five years of probation and sixty days of incarceration.^{2/}

Chief Judge

^{2/} In Bearden v. Georgia, 461 U.S. 660 (1983), the United States Supreme Court held that a defendant who has made bona fide efforts to pay restitution, but fails to do so, may be sentenced to incarceration "if the sentencing court determines that alternatives to imprisonment are not adequate in a particular situation to meet the State's interest in punishment and deterrence[.]" Bearden, 461 U.S. at 672. However, the Circuit Court did not make this finding and did not rely on this ground in revoking Yu's probation and resentencing him.